NO. 84325-2

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant,

v.

SAMANTHA A.,

Respondent.

RESPONSE TO AMICUS BRIEF OF COLUMBIA LEGAL SERVICES

ROBERT M. MCKENNA
Attorney General

EDWARD J. DEE
WSBA No. 15964
BRUCE WORK
WSBA No. 33824
Assistant Attorneys General
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6496

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Amicus curiae Columbia Legal Services (CLS) asserts that the Washington State Department of Social and Health Services (department or DSHS) seeks to deny reasonable fees for attorneys of DSHS clients who prevail against the department in judicial review cases brought under Title 74 RCW. However, CLS does not discuss the key term in that assertion: *reasonable*. Because RCW 74.08.080 provides no guidance on reasonable attorney fees in judicial review cases involving public assistance services, it is appropriate to look to the Equal Access to Justice Act (EAJA), which provides a clear standard for what is reasonable to enable low income persons to challenge government agency actions. Applying the fee limitations in the EAJA to public assistance cases will not deny reasonable attorney fees in Title 74 cases; on the contrary, it will ensure that fees *are* reasonable.

In this case, the trial court awarded Respondent over $85,000 for that stage of the proceedings, the full amount requested by her attorneys, but it provided no explanation for the award. Based on the standards established by the legislature for reasonable attorneys' fees under the EAJA, that award was manifestly unreasonable. In the event Respondent prevails in this Court, the Court should apply the reasonableness standard

in the EAJA and award no more than $25,000 for each of the two stages of this appeal.

II. RELEVANT BACKGROUND

Following the issuance of the superior court order on the merits in this case, Respondent submitted a petition for attorney fees (with supporting declarations), requesting a total of $85,423.35 in fees for the work of three attorneys and $947.85 in costs. CP at 324-388. The department responded in opposition to the request (CP at 394-411), Respondent replied (CP at 414-441), and the court heard oral argument. The court subsequently issued a judgment and order that granted the requested attorney fees in their entirety. CP at 443-445. The judgment simply identified the judgment creditors and debtors, and the amounts awarded to the former. The order stated the following:

> In accordance with the Court's Findings of Fact, Conclusions of Law and Order, fees are awarded to the petitioner in the amount of $85, 423.35 for work performed at the Superior Court level. Respondent [DSHS] will be required to pay Sirianni Youtz Meier and Spoonemore $34, 370.00 and Disability Rights Washington $51,053.35. This order shall be stayed pending the completion of the appeals process.

The Conclusions of Law and Findings of Fact in the court's order on the merits provide no information relevant to attorney fees, other than to note that Respondent (Petitioner there) should be awarded reasonable

attorney fees. CP at 250-259. Thus, although the record in the case contains considerable information related to attorney fees, there is nothing in the record that explains why the court determined that Respondent's request was reasonable.

III. ARGUMENT

A. The Determination Of Reasonable Attorney Fees Under Title 74 RCW Must Harmonize With The Definition Of Reasonable Attorney Fees Under The Equal Access To Justice Act

The question of whether the definition of reasonable attorney fees in the EAJA should apply in judicial review cases under Title 74 is a matter of statutory construction, and therefore should be reviewed *de novo* under the error of law standard. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 202, 95 P.3d 337 (2004). In order to answer the question, the Court must determine the meaning of the term "reasonable" in RCW 74.08.080. Because the statute itself does not define the term, the court should give the word its common law or ordinary meaning, *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). The court may also look to related statutes to determine meaning. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) ("The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory

scheme . . . which maintains the integrity of the respective statutes.") (alteration in original) (citation omitted) (internal quotation marks omitted).

Webster's II New College Dictionary 923 (1995), defines "reasonable", in relevant part, as "[n]ot extreme or excessive: FAIR." *Black's Law Dictionary* 874 (6th ed. 1991) defines "reasonable" as "[f]air, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. . . . Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable." While those definitions might provide some help to a court, they obviously lack specificity. Parties and courts may disagree as much over what is "fair" or "suitable" or "not excessive" as they will over what is "reasonable." It is therefore appropriate to consider the specific definition of "reasonable" provided by a statute that serves the same essential purpose as the statute in question.

The purpose of the EAJA is unambiguous. As this Court recently held, the "explicit statement of intent" set out in Laws of 1995, ch. 403 § 901 is that the EAJA is meant "to ensure the public has the ability to contest and appeal agency decisions and rule making." *Costanich v. State Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 931, 194 P.3d 988 (2008). This must also be the purpose of RCW 74.08.080, even though no

statement of purpose was provided by the legislature. CLS itself states that the statute "is intended to encourage lawyers to represent low-income public assistance recipients and applicants." Amicus Brief at 5. Because the "public" that the EAJA is concerned with are persons who may be deterred from challenging an agency action due to the expense, there can be little question that both statutes serve the same purpose.

Since both RCW 74.08.080 and the EAJA facilitate the ability of persons who are aggrieved by agency actions to bring their grievances before a court of law, the meaning of a common term in both statutes should not be in conflict. The legislature explicitly defined reasonable attorney fees in the EAJA, and that definition should be extended to RCW 74.08.080 so that the kind of incongruous fees awarded by the trial court in this case are prevented. What is *reasonable* in terms of attorney fees cannot differ by a factor of three[1] depending on whether the attorney is representing a client against an agency action in a public assistance case or some other kind of case. Allowing such a discrepancy creates an unacceptable discord between the two statutes and opens the door to enormous differences in fee awards in cases that are exactly the same—judicial reviews of agency actions under chapter 34.05 RCW. This cannot be the outcome the legislature intended.

[1] The award by the trial court of $85,423 in attorney fees is 3.4 times as high as the $25,000 limit set out in RCW 4.84.350(2).

B. The Fee-Shifting Requirement Under The EAJA Is Meant To Benefit The Same Class Of Persons As The Fee-Shifting Requirement Under RCW 74.08.080

CLS nevertheless argues that the reasonableness definition in the EAJA should not be applied to RCW 74.08.080 because persons who might bring a judicial review action under RCW 74.08.080 are categorically different than persons who might bring exactly the same type of action under the EAJA. According to CLS, the former are always financially needy, but the latter may or may not be. This is inaccurate, at least as to public assistance appellants. All children who are enrolled in one of the Medicaid waiver programs, such as the Respondent in this case, receive state medical benefits regardless of their family's financial need, and are therefore eligible to bring an appeal under Title 74 RCW. Indeed, while the financial status of Respondent's mother in this case is not part of the record, the appeal could have been brought by a child living in a family of substantial means.[2]

In any event, even if it were accurate that all Title 74 appellants were financially needy, that fact is irrelevant. The fee-shifting requirement under the EAJA was enacted precisely for those litigants who are financially needy and might otherwise be unable to challenge an

---

[2] *See also Whitehead v. Dep't of Social & Health Servs.*, 92 Wn.2d 265, 270, 595 P.2d 926 (1979) (holding that provisions of RCW 74.08.080 are applicable to persons seeking judicial review of a DSHS determination of child support).

agency action. The fact that a relatively wealthy person might also benefit from the fee-shifting aspect of the statute was pointedly not the purpose of the statute.

Furthermore, the assertion by CLS that an attorney fee cap of $25,000 per level of judicial review would chill potential representation of Title 74 appellants is at best pure speculation, and it is at odds with the legislature's perspective on the amount required to interest attorneys in representing appeals against state agencies. This Court has affirmed that such an amount is a reflection of legislative intent to keep private litigants from being deterred from bringing actions against government agencies. *Costanich* at 931.[3]

Given that the state legislature has determined that $25,000 in attorneys fees for each stage of review is sufficient to ensure that persons of any income level have the ability to hire attorneys to help them challenge agency actions, it would be absurd to suppose that that amount would be seen as insufficient to challenge public assistance decisions

---

[3] Indeed, Chief Justice Alexander wrote in dissent that $25,000 was an appropriate fee for *all* stages of judicial review combined:

> It goes without saying that an award of fees in the amount of $25,000 is not insignificant and would not only constitute full reimbursement in many, if not most, cases but would be a great aid to anyone who is seeking on review to have their rights in administrative proceedings vindicated.

Costanich at 941.

simply because it is arguably more likely that the appellant would be poor. Indeed, if that were true the legislature would have had to impute an additional reasonableness factor to the list in RPC 1.5(a), since the particular subject matter of the action is not one of those factors.[4]

CLS also argues that because the EAJA has another limitation that RCW 74.08.080 lacks—the substantial justification requirement—this limitation must apply if the fee cap applies. This argument is specious. The importation of the EAJA fee cap to public assistance cases is entirely related to the question of what "reasonable attorneys fees" means in RCW 74.08.080(3)—it is guidance as to how that term should be interpreted. There is no necessity to apply the substantial justification requirement, or, as CLS clearly intends, to ignore the EAJA fee limitations *because* of that requirement. Because RCW 74.08.080 lacks a definition of reasonable, *some* standard has to apply,[5] and the most appropriate standard is the one provided by the EAJA.

---

[4] RPC 1.5(a) lists nine separate "factors to be considered in determining the reasonableness of a fee," such as the time, labor and skill involved, customary fees in the locality, the experience of the lawyer, etc. The novelty of the issues may be considered, but there is no reason to believe that public assistance cases would involve more novel issues than other judicial review cases.

[5] The lodestar method alone does not supply a standard, since it involves undefined *reasonable* hourly rates multiplied by a *reasonable* number of hours expended.

C. Absence Of Fee Limitations Under RCW 74.08.080 Disproportionately Affects DSHS, And Indirectly Harms Client Services

This case demonstrates the importance of using the criteria established by the state legislature in the EAJA to determine reasonable attorneys' fees in judicial review actions. The trial court awarded over $86,000 in fees and costs for just one level of review, and did so without any explanation. The court apparently did not analyze whether it was really necessary for a team of three attorneys to adequately represent this appellant, despite the fact that DSHS was represented by a single attorney and the court had previously praised the briefing and argument of both party's attorneys as being equally good.[6] Two of the attorneys billed at a very high hourly rate due to their exceptional experience and expertise in Medicaid law. The court should have found that one attorney who was experienced in Medicaid law and who devoted approximately the same number of hours on this case as did DSHS's single lawyer was sufficient. The court should also have discounted time spent on a partial summary judgment motion, since the motion was procedurally inappropriate in a

---

[6] The court stated in its oral ruling:

> "I guess I just want to say this before I forget, because I think both counsel really did an excellent job briefing and addressing the issues. The record is clear and thorough. It was very easy for me to kind of get through both of your briefing and your authorities and your citations, and if you want to teach other people how to do a good job. You could easily do that."

CP at 339-340

judicial review case, and in any event was denied. Had it made those findings, the $25,000 EAJA fee cap would have been more than sufficient to cover Respondent's legal costs, even if a lone attorney charged the same hourly rate as Respondent's very experienced attorneys charged in this case ($350 per hour).

The problem here was not that the court abused its discretion in failing to better scrutinize the fee request (although Appellant believes that it did in fact abuse its discretion), but rather that its discretion was too broad. With no clear parameters on fees, courts are relatively free to authorize fees with little justification. This is particularly problematic for an agency such as DSHS. DSHS serves over 1.5 million public assistance clients[7] and makes one or more service related decisions per client per year. To expose the department to fee awards of this magnitude whenever public assistance applicants or recipients seek judicial review of agency actions would divert already scarce resources away from direct client services.[8] Without the criteria set forth by the legislature in the EAJA, this kind of attorney fee award can be expected to continue in cases involving public assistance services.

---

[7] *See DSHS Client Services Report for July 2006-June 2007,* Economic Services Total, available at: http://clientdata.rda.dshs.wa.gov/ReportServer/Pages/ReportViewer.aspx?/CSDBAnyYear/Landscape_StateClientSvcsByAge (last viewed October 28, 2010).

[8] DSHS receives no separate legislative appropriation for awards of attorneys' fees in judicial review cases.

D. The Trial Court Abused Its Discretion In This Case By Failing To Make A Reasonableness Determination

Even if this Court were to decline to apply the EAJA reasonableness standard to the attorney fee award in this case (if Respondent were to prevail), the superior court order awarding fees should still be overturned. The court ordered DSHS to pay all the fees requested by Respondent's three attorneys in this case, but the court made no assessment of reasonableness whatsoever, under *any* standard. RCW 74.08.080 authorizes *reasonable* attorney fees, but the award in this case made no reference to reasonableness–it was simply a grant of the amount of fees requested. More accurately, it was an order for DSHS to pay Respondent's attorneys everything they asked for. That action was a clear derogation of the court's duty to ensure that fees are reasonable. At the least, the court was required to make findings of facts and conclusions of law that explained why a fee award of such magnitude could be considered reasonable.

An appellate court may overturn a trial court's attorney fee award if it determines that the trial court abused its discretion in making the award. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). A trial court abuses its discretion if the award is manifestly unreasonable or based on untenable grounds or reasons. *Id.* Failure to

state a basis for the award may also be an abuse of discretion. *Id.* This Court should therefore independently review the record to determine whether fees were reasonable. In particular, the Court should review the briefing by the parties related to the attorney fee request. *See* CP at 317-445. It will be abundantly clear from the record that the fee request was unreasonable by any standard, and that the trial court abused its discretion by awarding the full amount of the request.

IV. IV. CONCLUSION

Because statutes must harmonize with one another, the parameters of reasonable attorney fees in the Equal Access to Justice Act must set the standard for reasonable attorney fees under RCW 74.08.080, since both statutes serve the purpose of helping low income persons challenge government agency actions.

RESPECTFULLY SUBMITTED this 29th day of October 2010.

ROBERT M. MCKENNA
Attorney General

BRUCE WORK, WSBA# 33824
EDWARD J. DEE, WSBA #15964
Assistant Attorneys General
P.O. Box 40124
Olympia, WA 98504-0124
Attorneys for State of Washington